

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

STEVEN KALMANOVITZ,

Plaintiff,

v.

DANIEL STANDEN, *et al.*,

Defendants.

No. C14-1224RSL

ORDER REGARDING
McGRANE'S MOTION FOR
SUMMARY JUDGMENT

This matter comes before the Court on “Defendant David McGrane’s Motion for Summary Judgment.” Dkt. # 27. Plaintiff alleges that he was owed back wages, benefits, and reimbursable expenses at the time his employer, Advanced Interactive Systems, Inc. (“AIS”), filed for Chapter 7 bankruptcy protection. He has asserted a breach of contract and a Washington Minimum Wage Act claim against four former officers/directors of AIS seeking to recover the principal amount of \$332,108.32 plus exemplary damages, costs, fees, and interest. Defendant David McGrane was Chief Executive Officer, President, and Chairman of the Board of Directors of AIS from May 15, 2012, to March 3, 2013, ten days before AIS declared bankruptcy. McGrane seeks dismissal of the claims against him.

Summary judgment is appropriate when, viewing the facts in the light most favorable to the nonmoving party, there is no genuine issue of material fact that would preclude the entry of judgment as a matter of law. The party seeking summary dismissal of the case “bears the initial

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responsibility of informing the district court of the basis for its motion” (Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986)) and “citing to particular parts of materials in the record” that show the absence of a genuine issue of material fact (Fed. R. Civ. P. 56(c)). Once the moving party has satisfied its burden, it is entitled to summary judgment if the non-moving party fails to designate “specific facts showing that there is a genuine issue for trial.” Celotex Corp., 477 U.S. at 324. The Court will “view the evidence in the light most favorable to the nonmoving party . . . and draw all reasonable inferences in that party’s favor.” Krechman v. County of Riverside, 723 F.3d 1104, 1109 (9th Cir. 2013). Although the Court must reserve for the trier of fact genuine issues regarding credibility, the weight of the evidence, and legitimate inferences, the “mere existence of a scintilla of evidence in support of the non-moving party’s position will be insufficient” to avoid judgment. City of Pomona v. SQM N. Am. Corp., 750 F.3d 1036, 1049 (9th Cir. 2014); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 252 (1986). Factual disputes whose resolution would not affect the outcome of the suit are irrelevant to the consideration of a motion for summary judgment. S. Cal. Darts Ass’n v. Zaffina, 762 F.3d 921, 925 (9th Cir. 2014). In other words, summary judgment should be granted where the nonmoving party fails to offer evidence from which a reasonable fact finder could return a verdict in its favor. FreecycleSunnyvale v. Freecycle Network, 626 F.3d 509, 514 (9th Cir. 2010).

Having reviewed the memoranda, declarations, and exhibits submitted by the parties¹ and taking the evidence in the light most favorable to the non-moving party, the Court finds as follows:

¹ Plaintiff’s evidentiary objections are overruled. The issue in this motion is McGrane’s wilfulness and intent: what defendant Standen or others told him about the company’s financial condition and decisions is relevant to McGrane’s state of mind, not for the truth of the matters asserted.

1 Plaintiff ran AIS until he was replaced as CEO and President by McGrane on May 15,
2 2012. Plaintiff's annual salary had been \$350,000 a year, but when AIS ran into financial
3 difficulties in 2009, plaintiff agreed to defer portions of his salary until AIS was stable again.²
4 McGrane was not involved in the negotiation or execution of any employment contract or
5 compensation agreement between AIS and plaintiff. Upon his ouster, plaintiff requested that AIS
6 pay the back wages it owed. McGrane became aware that plaintiff and a number of other
7 employees had deferred compensation claims and made efforts to get them paid: he sequestered
8 funds sufficient to cover the outstanding wages and expenses. Although the Board of Directors
9 authorized payments to the other executives, it declined to pay plaintiff because of objections
10 from the private equity firm that had invested in AIS and AIS' secured lender.

11 McGrane would have preferred to pay plaintiff along with the other executives and was
12 confident that the sequestered funds would eventually be released to plaintiff when the parties
13 reached an agreement on the amount owed. Nevertheless, he went along with and executed the
14 Board's instructions.³ McGrane argues that he had no choice in the matter because he was bound
15 to follow the Board's instructions and AIS' secured lender would have blocked any check
16 written to plaintiff. McGrane did not, however, vote in favor of distributing funds to plaintiff or
17 attempt to make such a distribution, instead instructing the Chief Financial Officer to release the
18 sequestered funds "with the exception of amounts associated with Steve K. Dan Standen will
19 handle directly with Steve so keep his balances in tact [sic] and separate." Dkt. # 39-3 at 8.
20 McGrane resigned and AIS went into bankruptcy before the parties were able to reach an
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23 ² In 2010, plaintiff's salary was reduced to \$250,000. After he was replaced as President and
24 CEO, plaintiff was paid \$50,000 per year for his service on AIS' Board of Directors.

25 ³ Pursuant to AIS' bylaws, the President and CEO had "general charge of the management of the
26 business and affairs of the corporation subject to the control of the Board of Directors, and will ensure
that all orders and resolutions of the Board of Directors are carried into effect" Dkt. # 28-5 at 4.

1 agreement on plaintiff's claim.⁴

2 McGrane seeks dismissal of plaintiff's claims on the grounds that (a) he did not have
3 control over AIS' funds or the decision to withhold payment of plaintiff's wages, (b) plaintiff
4 "knowingly submitted" to the alleged violations of the Washington Minimum Wage Act,
5 (c) plaintiff's claim is either time-barred or arose after McGrane had resigned, and (d) plaintiff
6 cannot establish damages because any payment made in early 2013 would have been unwound
7 by the bankruptcy trustee.⁵ Each argument is considered below.

8 **A. Control under the Washington Minimum Wage Act ("MWA")**

9 Under Washington law, "[a]ny . . . officer, vice principal or agent of any employer . . .
10 who . . . [w]ilfully and with intent to deprive the employee of any part of his or her wages, shall
11 pay any employee a lower wage than the wage such employer is obligated to pay such employee
12 by any statute, ordinance, or contract" "shall be liable in a civil action by the aggrieved
13 employee . . . for twice the amount of the wages unlawfully . . . withheld . . . together with costs
14 of suit and a reasonable sum for attorney's fees" RCW 49.52.050 and RCW 49.52.070. The
15 legislature imposed personal liability on the officers of an employer

16 because the officers control the financial decisions of the corporation. . . . The
17 officers decide whether to pay one debt over another (i.e., wages). The officers
18 have the choice to file bankruptcy or, say, close the business and pay its debts
19 (including wages). The officers decide whether to continue running an
20 inadequately capitalized corporation while hoping for a change in financial
position. In other words, the officers control the choices over how the
corporation's money is used, and (in cases of unpaid wage claims) RCW

22 ⁴ Plaintiff argues that McGrane participated in the decision to terminate plaintiff's employment
23 and file for bankruptcy before resigning. Dkt. # 58 at 10. The evidence cited ("Bianchi Dec., Ex. T") is
24 not, however, the minutes of the March 3, 2013, Board meeting and does not support plaintiff's
assertion.

25 ⁵ To the extent plaintiff has alleged a breach of contract claim against McGrane, it fails as a
26 matter of law because McGrane did not participate in the negotiation or execution of the deferred
compensation agreement.

1 49.52.070 imposes personal liability when the officers choose not to pay wages
2 owed.

3 Morgan v. Kingen, 166 Wash.2d 526, 536-37 (2009).

4 Personal liability for an employee's wages under the MWA requires a finding that the
5 defendant is an "officer, vice principal or agent" of the employer and that the wages were
6 wilfully withheld. Ellerman v. Centerpoint Prepress, Inc., 143 Wash.2d 514, 521 (2001). In
7 order to establish a wilful withholding, plaintiff must show that the defendant directly supervised
8 or controlled the decision to pay wages. Id. at 521-22. Participation in the initial failure to pay is
9 not necessary: if defendant, upon learning of the underpayment, chose not to pay the wages
10 owed, such a choice is wilful and intentional for purposes of establishing personal liability under
11 the MWA. Morgan, 166 Wn.2d at 537; Jumamil v. Lakeside Casino, LLC, 179 Wn. App. 665,
12 685 (2014).

13 McGrane argues that he cannot be held personally liable for unpaid wages because he was
14 simply carrying out the Board's instructions, as he was compelled to do by the corporate bylaws.
15 If he were simply a messenger and not a decisionmaker, summary judgment might be
16 appropriate. McGrane was, however, the Chairman of the Board of Directors and participated in
17 the decision-making process that resulted in the payment of all deferred compensation except
18 that owed to plaintiff. McGrane made a choice, and it is at least arguable that the choice was
19 wilful and intentional.⁶

21 ⁶ To the extent McGrane is arguing that it would have been impossible for him to pay plaintiff
22 because AIS' secured lender would have (1) intercepted and refused to honor any check issued to
23 plaintiff or (2) cut off AIS' financing going forward, neither assertion excuses the wilful and intentional
24 failure to pay wages. The MWA evinces "a strong legislative intent to assure payment to employees of
25 wages they have earned." Shilling v. Radio Holdings, Inc., 136 Wn.2d 152, 159 (1998). Taking the
26 evidence in the light most favorable to plaintiff, one could conclude that McGrane made no effort to pay
the employee, instead choosing to mollify a secured creditor to avoid jeopardizing the company's
financing. This is exactly the type of choice for which the legislature provided a remedy of exemplary
damages plus fees and costs.

1 **B. “Knowingly Submitted”**

2 An officer who wilfully deprives an employee of his wages is not liable in a civil action if
 3 the employee has “knowingly submitted” to the deprivation. RCW 49.52.070. McGrane offers
 4 no legal authority for the proposition that an agreement to defer compensation is a knowing
 5 submission to a later non-payment. A person knowingly submits to the withholding of wages
 6 when he or she “deliberately and intentionally deferred to [the employer] the decision of whether
 7 [the wages] would ever be paid.” Chelius v. Questar Microsystems, Inc., 107 Wn. App. 678, 682
 8 (2001). Here, there is evidence that plaintiff agreed to defer his salary only until AIS’ finances
 9 stabilized, that he never waived his right to payment, that he expected to be paid his full salary
 10 eventually, and that AIS was aware of the deferred compensation obligation and plaintiff’s
 11 expectations. In such circumstances, there is at least an issue of fact regarding whether plaintiff
 12 knowingly submitted to the non-payment. Durand v. HIMC Corp., 151 Wn. App. 818, 837
 13 (2009).

14 **C. Date Claim Accrued**

15 McGrane argues that plaintiff’s claim accrued anew when plaintiff received less than was
 16 his due in each paycheck and that all claims for wages earned prior to July 14, 2011, are barred
 17 by the three-year statute of limitations.⁷ The parties agreed, however, to defer payment of part of
 18 plaintiff’s wages for a period of time. Those amounts were not, therefore, due as they were
 19 earned, and their recovery is not time-barred.

20 In the alternative, McGrane argues that plaintiff had no right to the unpaid wages until his
 21 employment with AIS terminated and he received his final paycheck, citing RCW 49.48.010.
 22 Plaintiff, on the other hand, argues that the unpaid wages became due and owing as soon as he
 23 made a demand for payment in May 2012. The Court is unable to determine when AIS had an
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25 ⁷ McGrane’s reliance on WAC 296-128-035 is misplaced. A violation of the MWA is not
 26 excused simply because the employer also violated the regulation that establishes the payment interval.

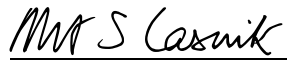
1 obligation to pay the deferred compensation based on the evidence provided. RCW 49.52.050(2)
2 prohibits employers from withholding pay that has become due under “any statute, ordinance, or
3 contract.” Plaintiff’s claim is based on an alleged contract, but the exact terms of the deferral
4 agreement are unclear. Plaintiff apparently negotiated the agreement with himself when he was
5 President and CEO, and there does not appear to be a written contract or policy in place.
6 Identifying the trigger for repayment is therefore difficult. In the complaint, plaintiff alleges that
7 he agreed to defer compensation “until the Company was more financially stable.” Dkt. # 1 at
8 ¶ 4.4. If, as plaintiff alleged, AIS was contractually obligated to pay plaintiff when it became
9 “more financially stable,” it is possible that plaintiff’s claim never accrued given the state of the
10 corporation’s finances from 2009 onward and its eventual bankruptcy. If, on the other hand, the
11 parties agreed that the deferred compensation would be payable upon demand, plaintiff’s claim
12 accrued in 2012. These issues cannot be decided in the context of this summary judgment
13 motion.

14 **D. Damages**

15 Finally, McGrane argues that plaintiff was not damaged by the nonpayment of wages
16 because, had a disbursement been made after May 2012, the bankruptcy trustee would have
17 avoided the transfer and forced plaintiff to return the money. The Bankruptcy Code allows the
18 trustee to set aside preferential transfers to company insiders (11 U.S.C. § 547), but it does not
19 require avoidance. Nor is there any indication that the trustee invalidated the deferred
20 compensation payments that were made to other insiders in January and February 2013.
21 McGrane’s argument is speculative and does not justify summary judgment on plaintiff’s MWA
22 claim.

1 For all of the foregoing reasons, defendant McGrane's motion for summary judgment
2 (Dkt. # 27) is GRANTED in part. Plaintiff's breach of contract claim against McGrane is
3 DISMISSED. McGrane's motion for summary judgment regarding the MWA claim is DENIED.
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5 Dated this 9th day of December, 2015.

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8 Robert S. Lasnik
9 United States District Judge
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